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Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-5 OF 2009(M)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZULKEFLI AND MOHD GHAZALI FCJJ
11 JULY 2011

Labour Law — Employment — Dismissal — Employee an Assistant Superintendent of Police — Whether dismissal unlawful, unconstitutional, void and of no effect — Whether rules of natural justice observed — Whether appellant given reasonable opportunity to be heard — Whether first respondent's exercise of discretion to refuse oral hearing contrary to art 135(2) of the Federal Constitution — Whether there were exceptions to Federal Court's ruling in Utra Badi's case — Public Officers (Conduct and Discipline)(Chapter D) General Orders 1980 general order 26

The appellant was a former Assistant Superintendent of Police in the Royal Malaysian Police Force. The Police Service Commission ('the first respondent') initiated disciplinary action against the appellant by way of a show cause letter dated 30 June 1993, which set out five charges against the appellant. The five charges related to corruption, dereliction of duties, failure to report illegal gambling activities and failure to take necessary action against certain named persons. The show cause letter gave the appellant the opportunity to make written representations to the first respondent. In his 40 page representation to the first respondent the appellant denied all the charges made against him and furnished reasons in support of the same. In addition, in the last paragraph of his written representation the appellant asserted that in the event that his explanations were deemed insufficient to exculpate him from the charges preferred against him then the disciplinary authority ('the DA') may appoint a committee of inquiry to consider his case, as provided for under general order 26 of the Public Officers (Conduct and Discipline)(Chapter D) General Orders 1980 ('the 1980' GO). The first respondent concluded that the appellant's representation had not shown sufficient cause and as a result the appellant was dismissed from the police force. The appellant thereafter filed a writ of summons in the High Court for a declaration that his dismissal was unlawful, unconstitutional, void and of no effect. In the High Court, the appellant contended that the charges against him were vague and imprecise and as such impossible to answer and that the proceedings which resulted in his dismissal were not conducted in accordance with the rules of natural justice as enshrined under art 135(2) of the Federal Constitution ('Constitution'). The respondent on the other hand stated that the charges had been clear and that it had afforded the appellant the opportunity to make representations which

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amounted to the right to be heard under art 135(2) of the Constitution. Based on the evidence the High Court concluded that the appellant's dismissal was fair and valid. The appellant's appeal to the Court of Appeal was also dismissed. This was the appellant's appeal against that decision. In this appeal it was the appellant's case that when replying to the show cause letter issued by the first respondent, he had made a specific request for an enquiry for further clarification as provided under general order 26 of the 1980 GO but that the first respondent had instead dismissed him from service. It was thus the appellant's contention that he was deprived of his right to be heard and that although he had requested for an oral hearing, no response was forthcoming. In response the respondent contended that under the provisions of the Constitution and the scheme of the 1980 GO, being afforded a reasonable right to be heard did not necessarily mean a right to be afforded at an oral hearing. In support the respondent relied on the Federal Court's cases of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 (*Utra Badi*'s case) and *Public Services Commission Malaysia & Anor v Vickneswary* (*Vickneswary*'s case) wherein it was held that the right to be heard given by art 135(2) of the Constitution did not require the person concerned to be given an oral hearing. In this appeal the appellant obtained leave to refer the question of law as to whether the Federal Court's ruling in *Utra Badi*'s case applied to all cases or whether there were exceptions to this rule.

Held, allowing the appeal with costs:

(1) (per **Richard Malanjum CJ (Sabah and Sarawak)**) The observation of procedural fairness that is closely connected to a fundamental right as enshrined in our Constitution is of paramount importance. Therefore it was critical for a public decision taker to know that it is under a duty to act fairly including the observation of the rules of natural justice. Accordingly as in the present case, when there was a request by the public officer for an oral hearing after he had denied all the charges then he should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Constitution (see para 6).

(2) (per **Zulkefli FCJ**) Both the High Court and the Court of Appeal failed to differentiate the factual circumstances and the issue for determination in *Utra Badi*'s case with the appellant's case. In *Utra Badi*'s case, the issue for determination was not a request by the public officer to be given the right of an oral hearing for further clarification if the DA was not satisfied with his representation, but a request to be given the right of an oral hearing for mitigation only before punishment was meted out. Further, in *Utra Badi*'s case there was no specific request made by the public officer for an oral enquiry. Each case must be viewed and evaluated on its own facts and circumstances and thus, *Utra Badi*'s case was a general principle that was restricted to its own facts. It did not cover a situation where the

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officer in his representation letter gave an exculpatory statement and also made a special request for an oral hearing. In such a situation the court was in a position to review and extend the general principle in *Utra Badi*'s case by stating the exception to this general rule (see paras 9–11).

(3) (per **Zulkefli FCJ**) After considering other cases wherein the facts of the case and the charges framed against the public officers were similar in nature, it was found that when there was a request by the public officer for an oral hearing after he had denied all the charges against him by furnishing credible evidence in his representation letter, then by virtue of general order 26(5) of the 1980 GO, the officer should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Constitution, which states that a reasonable opportunity of being heard be given before any member of such a service was dismissed or reduced in rank (see paras 15–18).

(4) (per **Zulkefli FCJ**)This court should distinguish *Utra Badi*'s case, which stated that the right to be heard given by art 135(2) of the Constitution did not require the person concerned to be given an oral hearing, by recognising the fact that there were exceptions to this general rule. If such exceptions were not recognised by the courts then the principle in *Utra Badi*'s case might lead to the DA exercising its discretion arbitrarily by simply refusing to call for an enquiry for further clarification although the officer concerned may have furnished sufficient evidence to exculpate himself. In fact in the present case the DA had not replied to the appellant's request for an oral hearing. It was further found that the charges framed against the appellant in the present case were general in nature and lacking in particulars. After considering the serious charges leveled against the appellant it was then found that the disciplinary proceedings taken against the appellant were null and void and that in all fairness the appellant ought to have been given an oral hearing as he had requested so as to enable him to make an effective and meaningful defence to the charges (see paras 20 & 22–24).

(5) (per **Mohd Ghazali FCJ**, dissenting) The question of law that was posed in the instant appeal denoted that the appellant was not disputing the principle in *Utra Badi*'s case and *Vickneswary*'s case but was requesting the court to speculate on whether there were exceptions to this rule. As such the question referred was premised on an hypothesis and it was questionable whether it could fall within the contemplation of s 96 of the Courts of Judicature Act 1964 (see paras 31, 57– 58).

(6) (per **Mohd Ghazali FCJ**, dissenting) The arguments canvassed by the appellant in this instant appeal were based on the misconstrued premise that the appellant made a special request for an oral hearing. However, the appellant in this case did not make a specific request for an oral hearing but had instead requested that an inquiry be held as provided

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under general order 26 of the GO 1980 in the eventuality that the first respondent found his written representations less than convincing. In any case under general order 26 it was for the DA to decide whether the case against the officer required further clarification. However, from the facts of the instant case the DA had concluded that they required no such further clarification and consequently dismissed the appellant. In the circumstances the court had no reason to interfere with the decision of the first respondent and the appeal ought to be dismissed as there was no error of law (see paras 38–40,46 & 56).

[Bahasa Malaysia summary

Perayu merupakan bekas Penolong Penguasa Polis dengan Pasukan Polis Diraja Malaysia. Suruhanjaya Perkhidmatan Polis ('responden pertama') memulakan tindakan tatatertib terhadap perayu melalui surat tunjuk sebab yang bertarikh 30 Jun 1993, yang menyenaraikan lima pertuduhan terhadap perayu. Kelima-lima pertuduhan tersebut berkaitan dengan rasuah, kelalaian dalam menjalankan tugas, kegagalan melaporkan aktiviti perjudian haram dan kegagalan mengambil tindakan yang sewajarnya terhadap orang-orang yang tertentu. Surat tunjuk sebab tersebut memberikan perayu peluang untuk membuat representasi bertulis kepada responden pertama. Di dalam representasi 40 muka suratnya kepada responden pertama perayu menafikan kesemua pertuduhan terhadapnya dan memberikan sebab-sebab yang menyokong pernyataannya. Tambahan, di dalam perenggan terakhir representasi bertulisnya perayu menyatakan bahawa jika penjelasannya dianggap tidak mencukupi untuk membebaskannya daripada pertuduhan-pertuduhan yang dikenakan terhadapnya, Lembaga Tatatertib ('LT') boleh melantik jawatankuasa siasatan untuk mempertimbangkan kesnya, seperti yang diperuntukkan di bawah perintah am 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Disiplin) 1980 ('PA 1980'). Responden pertama membuat kesimpulan bahawa representasi perayu tidak menunjukkan alasan yang mencukupi dan oleh demikian perayu dipecat daripada pasukan polis. Perayu kemudiannya memfailkan writ saman di Mahkamah Tinggi untuk deklarasi bahawa pemecatannya tidak sah, tidak berperlembagaan, batal dan tidak mempunyai kesan. Di Mahkamah Tinggi, perayu menghujah bahawa pertuduhan-pertuduhan terhadapnya adalah kabur dan tidak jelas dan oleh itu mustahil untuk dijawab dan prosiding yang membawa kepada pemecatannya tidak dijalankan menurut peraturan keadilan semulajadi seperti yang diperuntukkan di bawah perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan'). Responden pula sebaliknya menyatakan bahawa pertuduhan-pertuduhan adalah jelas dan ia telah memberikan perayu peluang untuk membuat representasi yang bermaksud hak untuk didengar di bawah perkara 135(2) Perlembagaan. Berdasarkan kepada keterangan Mahkamah Tinggi memutuskan bahawa pemecatan perayu adalah adil dan sah. Rayuan perayu ke Mahkamah Rayuan juga ditolak. Ini adalah rayuan perayu terhadap keputusan tersebut. Di dalam rayuan ini, kes perayu adalah

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bahawa apabila menjawab surat tunjuk sebab yang dikeluarkan oleh responden pertama, dia telah membuat permohonan secara spesifik untuk siasatan bagi penjelasan lanjut seperti yang diperuntukkan di bawah perintah am 26 Perintah Am 1980 tetapi bahawa responden pertama telah sebaliknya dipecat daripada perkhidmatan. Oleh itu adalah hujahan perayu bahawa dia telah dinafikan hak untuk dibicarakan dan bahawa walaupun dia telah memohon untuk perbicaraan lisan, tiada jawapan yang diberikan. Sebagai balasan responden menghujah bahawa di bawah peruntukan Perlembagaan dan skim Perintah Am 1980, peluang secara munasabah untuk dibicarakan tidak semestinya bermaksud hak untuk diberikan perbicaraan lisan. Sebagai sokongan, responden menyandar pada kes *Mahkamah Persekutuan Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 (kes *Utra Badi*) and *Public Services Commission Malaysia & Anor v Vickneswary* (kes *Vickneswary*) di mana diputuskan bahawa hak untuk dibicarakan yang diperuntukkan oleh perkara 135(2) Perlembagaan tidak memerlukan orang yang berkaitan dibicara secara lisan. Di dalam rayuan ini perayu memperoleh kebenaran untuk merujuk persoalan undang-undang sama ada keputusan Mahkamah Persekutuan di dalam kes *Utra Badi* beraplikasi kepada kesemua kes atau sama ada terdapat pengecualian kepada peraturan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Pematuhan kepada keadilan semula jadi yang berkait rapat dengan hak asasi seperti yang diperuntukkan di dalam Perlembagaan adalah paling utama. Oleh demikian adalah penting untuk pembuat keputusan awam untuk mengetahui bahawa ia bertanggungjawab untuk bertindak secara adil termasuk pematuhan kepada peraturan keadilan semula jadi. Dengan itu, seperti di dalam kes ini, apabila terdapat permohonan oleh pegawai awam untuk perbicaraan lisan selepas dia menafikan kesemua pertuduhan dia sepatutnya diberikan perbicaraan lisan untuk memenuhi keperluan perkara 135(2) Perlembagaan (lihat perenggan 6).

(2) (oleh **Zulkefli HMP**) Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan gagal membezakan hal keadaan fakta dan isu yang perlu diputuskan di dalam kes Utra Badi dengan kes perayu. Di dalam kes *Utra Badi*, isu yang perlu diputuskan bukan permohonan oleh pegawai am untuk diberikan hak untuk perbicaraan secara lisan untuk penjelasan lanjut jika LT tidak berpuashati dengan representasinya, tetapi permohonan untuk diberikan hak untuk perbicaraan lisan untuk pengurangan hanya sebelum hukuman dikenakan. Selanjutnya, di dalam kes *Utra Badi* tidak ada permohonan spesifik yang dibuat oleh pegawai am untuk siasatan lisan. Setiap kes mesti dilihat dan dinilai atas fakta dan keadaannya sendiri dan dengan itu, kes *Utra Badi* adalah prinsip am yang dihadkan kepada faktanya sendiri. Ia tidak merangkumi situasi di mana

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pegawai di dalam surat rujukannya memberikan kenyataan yang membebaskannya dan juga membuat permohonan khas untuk perbicaraan secara lisan. Di dalam keadaan sedemikian mahkamah berada dalam kedudukan untuk menyemak dan melanjutkan prinsip am di dalam kes *Utra Badi* dengan menyatakan pengecualian kepada peraturan am ini (lihat perenggan 9–11).

(3) (oleh **Zulkefli HMP**) Selepas mempertimbangkan kes-kes lain di mana fakta kes dan pertuduhan-pertuduhan yang dikenakan ke atas pegawai awam adalah serupa, didapati bahawa apabila terdapat permohonan oleh pegawai awam untuk perbicaraan lisan selepas dia menafikan kesemua pertuduhan terhadapnya dengan memberikan keterangan yang boleh dipercayai di dalam surat rujukannya, maka berikutan perintah am 26(5) PA 1980, pegawai tersebut wajar diberikan perbicaraan lisan untuk memenuhi keperluan perkara 135(2) Perlembagaan yang menyatakan bahawa peluang munasabah untuk dibicarakan perlu diberikan sebelum mana-mana ahli perkhidmatan tersebut dipecat atau diturunkan pangkat (lihat perenggan 15–18).

(4) (oleh **Zulkefli HMP**) Mahkamah wajar membezakan kes *Utra Badi*, yang menyatakan bahawa hak untuk didengar yang diperuntukkan oleh perkara 135(2) Perlembagaan tidak memerlukan orang yang berkaitan diberikan perbicaraan lisan, dengan mengakui fakta bahawa terdapat pengecualian kepada peraturan am ini. Jika pengecualian sedemikian tidak diakui oleh mahkamah-mahkamah maka prinsip di dalam kes *Utra Badi* mungkin membawa kepada LT melaksanakan budi bicaranya secara sewenang-wenangnya dengan sengaja enggan membuat siasatan untuk penjelasan lanjut walaupun pegawai yang berkaitan mungkin telah memberikan keterangan yang mencukupi untuk membebaskan dirinya sendiri. Pada hakikatnya, di dalam kes ini LT tidak menjawab permohonan perayu untuk perbicaraan lisan. Ia juga selanjutnya didapati bahawa pertuduhan-pertuduhan yang dikenakan terhadap perayu di dalam kes ini adalah bersifat umum dan kekurangan butiran. Selepas mempertimbangkan pertuduhan serius yang dikenakan terhadap perayu, didapati bahawa prosiding tatatertib yang diambil terhadap perayu adalah batal dan tidak sah dan dalam menegakkan keadilan perayu wajar diberikan perbicaraan lisan seperti yang dipohonnya untuk membolehkan dia membela pertuduhan secara berkesan dan penuh bermakna (lihat perenggan 20 & 22–24).

(5) (oleh **Mohd Ghazali HMP**, menentang) Persoalan undang-undang yang dikemukakan di dalam rayuan ini bermaksud bahawa perayu tidak menafikan prinsip di dalam kes *Utra Badi* dan kes *Vickneswary* tetapi memohon kepada mahkamah untuk membuat spekulasi sama ada terdapat pengecualian kepada peraturan ini. Oleh demikian persoalan yang dirujuk diasaskan atas hipotesis dan boleh dipertikaikan sama ada ia

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boleh termasuk dalam rangkuman s 96 Akta Mahkamah Kehakiman 1964 (lihat perenggan 31 & 57–58).

(6) (oleh **Mohd Ghazali HMP**, menentang) Hujahan yang dikemukakan oleh perayu di dalam rayuan ini adalah didasarkan kepada salah tafsiran bahawa perayu membuat permohonan khas untuk perbicaraan lisan. Walau bagaimanapun, perayu di dalam kes ini tidak membuat permohonan secara spesifik untuk perbicaraan lisan tetapi sebaliknya memohon bahawa satu siasatan diadakan seperti yang diperuntukkan di bawah perintah am 26 Perintah Am 1980 jika responden pertama mendapati representasi bertulisnya tidak memuaskan. Walau apa pun, di bawah perintah am 26 pihak berkuasa tatatertib bertanggungjawab untuk memutuskan sama ada kes terhadap pegawai tersebut memerlukan penjelasan lanjut. Walau bagaimanapun, daripada fakta kes ini, JT telah memutuskan bahawa mereka tidak memerlukan penjelasan lanjut dan dengan itu memecat perayu. Dalam keadaan tersebut, mahkamah tidak ada alasan untuk campur tangan dalam keputusan responden pertama dan rayuan tersebut mesti ditolak kerana tidak ada kesilapan dari segi undang-undang (lihat perenggan 38–40, 46 & 56).]

Notes:

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

Cases referred to

Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 2 MLJ 131; [2002] 1 CLJ 493, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169, FC (refd)

Chai Kok Choi v Ketua Polis Negara & Ors [2008] 1 MLJ 725; [2008] 1 AMR 93, FC (refd)

Delhi Transport Corporation v DTC Mazdoor Congress & Ors [1991] Supp 1 SCC 600 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [2010] 6 MLJ 441; [2011] 2 AMR 765, FC (refd)

Halimatussaadiah v Public Service Commission, Malaysia & Anor [1992] 1 MLJ 513, HC (refd)

Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61, SC (refd)

HK (an infant), Re [1967] 2 QB 617 (refd)

Laker Airways Ltd v Department of Trade [1977] QB 643, CA (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

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Mahkamah Persekutuan Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417 (refd)
Mat Ghaffar bin Baba v Ketua Polis Negara & Anor [2008] 2 MLJ 1; [2008] 2 AMR 41, CA (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)
Najar Singh v Government of Malaysia & Anor [1974] 1 MLJ 138, FC (refd)
Ng Hock Seng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1, FC (refd)
R v Deputy Industrial Injuries Commissioner, ex p Moore [1965] 1 QB 456 (refd)
R v Immmigration Appeal Tribunal, ex p Mehmet [1977] 2 All ER 602, QBD (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308; [1995] 1 AMR 855, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)
Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2005] 1 MLJ 320, HC (refd)
Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2008] 4 AMR 835, CA (refd)
Zainal bin Hashim v Government of Malaysia [1979] 2 MLJ 276, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96
Federal Constituition arts 5(1), 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 (General Orders 1980) general order 4, 4 (2)(c)(i), (2)(f), (2)(g), 23, 26, 26(4), (5), 36(i)

G Subramaniam Nair (Marisa Regina with him) (Aris Rizal Christopher Fernando & Co) for the appellant.
Narkunavathy Sundareson (Siti Noor Mazlifah Mokhtar with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak):

[1] I have had the advantage of reading in drafts the respective judgments of my learned brothers, Zulkefli bin Ahmad Makinudin FCJ and Mohd Ghazali bin Mohd Yusoff FCJ.

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[2] With respect I am inclined to agree with the draft judgment of Zulkefli bin Ahmad Makinudin FCJ.

[3] I would add that the term 'law' in a given legislation including a written constitution has been understood to encompass both substantive law and procedure including the rules of natural justice.

[4] Thus, in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 Lord Diplock at p 71 said this:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law', 'protection of the law' and the like, in Their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.
>
> It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.
>
> If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

[5] Accordingly, observation of procedural fairness that is closely connected to a fundamental right, for instance, the right to life (article 5(1)) as enshrined in our Federal Constitution is of paramount importance. Indeed right to life has been interpreted to include the right to livelihood. And it has been said that 'income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental' (see *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* [1991] Supp 1 SCC 600) and referred to by our Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. Hence, failure to observe such procedural fairness would tantamount to a breach or aiding a breach of such fundamental right.

[6] It is therefore critical for a public decision taker to know that it is under a duty to act fairly including the observation of the rules of natural justice which comprised of two maxims namely, no man shall be a judge in his own cause and that no man shall be condemned unheard (see *Re HK (an infant)* [1967] 2 QB 617).

[7] Accordingly I agree with my learned brother Zulkefli bin Ahmad

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Makinudin FCJ that 'when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of Order 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Federal Constitution …'. And like my learned brother I too allow this appeal and grant the relief as given by him.

Zulkefli FCJ:

INTRODUCTION

[8] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court at Malacca. Leave to appeal was granted by this court to refer one question as follows:

> Whether the principle in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 (FC) and the case of *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu deceased)* [2008] 6 MLJ 1 (FC) which states 'the right to be heard given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing' applies in all cases or whether there are exceptions (to this general rule).

BACKGROUND FACTS

[9] The appellant was a former police officer with a rank of an Assistant Superintendant Police in the Royal Malaysian Police Force. By way of a letter dated 30 June 1993, disciplinary proceedings were initiated by the first respondent against the appellant in respect of five (5) charges relating to corruption, dereliction of duties, failure to report illegal gambling activities and for failure to take the necessary action against certain named persons. The show cause letter was issued to the appellant for him to make his representation. The appellant made his representation in a letter dated 29 July 1993. In short the appellant denied all the charges made against him and furnishing reasons in support of the same. What is pertinent is that in addition to his reply, the appellant in the last paragraph of his letter (para 17) wrote the following:

> 17. Izinkan saya memohon budi bicara Yang Berbahagia Datuk memberi peluang kepada saya, sekiranya representasi saya ini kurang menyakinkan saya memohon diadakan satu Inquiry sepertimana pembekalan di bawah peraturan 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980.

By the above statement the appellant asserted that in the event that his explanation is deemed insufficient to exculpate himself from those charges he

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prayed that on oral hearing by way of an inquiry as provided for under Order 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('General Orders 1980') be given to him.

[10] The first respondent ignored the appellant's request as per para 17 of his letter and proceeded to consider the representation made by the appellant. Having done so the first respondent decided that the appellant be dismissed from service by way of a letter dated 15 August 1994. On 4 February 1997, the appellant instituted legal proceedings against the respondents for wrongful dismissal. Both parties did not call witnesses to support their respective cases. The learned trial judge after hearing by way of submissions only dismissed the appellant's claim with costs. On appeal to the Court of Appeal, the Court of Appeal dismissed the appeal.

THE RIGHT TO BE HEARD

[11] On the right to be heard of a member of the public service before a disciplinary authority art 135(2) of the Federal Constitution provides as follows:

> No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard: …

The right to be afforded a reasonable opportunity of being heard is replicated in Order 23 of the General Orders 1980 as follows:

> In all disciplinary proceedings under this Part no officer shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard:…

[12] Order 26 of the General Orders 1980 sets out the procedure governing disciplinary proceedings that merit the punishment of dismissal or reduction in rank as follows:

> (1) Where it is represented to, or found by, the appropriate disciplinary authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the disciplinary authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.
>
> (2) The appropriate disciplinary authority shall, after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the legal department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call

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upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the appropriate disciplinary authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the disciplinary authority may impose upon the officer such lesser punishment as it may deem fit.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the appropriate disciplinary authority considers that the case against the officer requires further clarification, it may appoint a committee of inquiry consisting of not less than two senior government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's head of department shall not be selected to be a member of the committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the committee and that he will be allowed and if the committee shall so determine, shall be required to appear before the committee and exculpate himself.

(7) If witnesses are examined by the committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The committee may, permit the government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission:

Provided that where the committee permits the government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the appropriate disciplinary authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original ground.

(10) The committee having inquired into the matter, shall make a report to the appropriate disciplinary authority. If the disciplinary authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the committee for further inquiry and report.

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(11) If, upon considering the report of the committee the appropriate disciplinary authority is of the opinion –

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the government accordingly. The question of pension will be dealt with under the Pensions Act

THE APPELLANT'S CASE

[13] It is the appellant's case when replying his show cause letter he had made a specific request for an enquiry for further clarification as provided under Order 26 of the General Orders 1980 if the first respondent is not satisfied that the appellant had exculpated himself in his representation. The appellant further contended that despite the specific request made by him, the first respondent did not reply as to whether his request shall be considered or rejected and if rejected why. Instead the first respondent just sent a simple letter dated 15 August 1994 informing the appellant that he has been dismissed without even stating whether the appellant in his representation letter was unable to exculpate himself.

[14] The appellant's cause of action against the respondents for wrongful dismissal is premised on the refusal or the failure of the first respondent through its disciplinary authority to appoint a committee of inquiry to allow the appellant an oral hearing for further clarification of his case in order for the disciplinary authority to arrive at a just decision. To the appellant in the circumstances of his case he has not been afforded a reasonable right to be heard in accordance with the provisions of art 135(2) of the Federal Constitution and Order 26 of the General Orders 1980.

THE RESPONDENTS' CASE

[15] It is the respondents' case under the provisions of the Federal Constitution and the scheme of the General Orders 1980 being afforded a reasonable right to be heard does not automatically translate to mean a right to be afforded an oral hearing. What it does mean is that a public officer subject to disciplinary proceedings must be given a fair opportunity to correct or contradict the case made against him. If there is something in the public officer's written representation that requires further clarification, then it is up to the disciplinary authority to decide whether or not to appoint a committee of

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inquiry. It is only at this stage of the disciplinary proceedings that the public officer will be allowed an oral hearing.

DECISION

[16] Both the High Court and the Court of Appeal in this case when dismissing the appellant's case and in holding that the refusal to allow the appellant an oral hearing is not contrary to law depended solely on the principle laid down in the Federal Court's case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal*. With utmost respect, I am of the view both the courts below failed to differentiate the factual circumstances and the issue for determination in *Utra Badi*'s case with the appellant's case. Each case must be viewed and evaluated on its own facts and circumstances. In *Utra Badi*'s case, the issue for determination was not a request by the public officer to be given the right of an oral hearing by way of an enquiry for further clarification if the disciplinary authority is not satisfied with his representation, but a request to be given the right of an oral hearing for mitigation only before punishment was meted out. It must also be noted that there was no specific request made by the officer in *Utra Badi*'s case for an oral enquiry for further clarification if the disciplinary authority is not satisfied with his representation.

[17] Again in the recent Federal Court's case of *Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [2010] MLJ 441,; [2011] 2 AMR 765 (FC), a similar question of law as in *Utra Badi*'s case was raised as follows:

> Whether the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l Perumal* [2001] 2 MLJ 417 was in fact right in concluding that there was no separate right to mitigate on punishment after a public officer was found to have committed a disciplinary offence and whether the Federal Court should review its previous decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 as the said decision cannot stand close scrutiny in logic and the application of the rules of natural justice.

[18] It is to be noted in *Gnanasekaran*'s case there was also no specific request by the officer for an oral enquiry for the purpose of enabling him to provide further clarification if the disciplinary authority is not satisfied with his representation. It is also a fact in *Gnanasekaran*'s case that the officer had admitted the disciplinary offences as disclosed in the charges but gave the reasons or the circumstances for their commission. He sought for forgiveness and undertook not to repeat them in future. It is my view that the principle in *Utra Badi*'s case is a general principle and restricted to its own facts. It does not cover situation where the officer in his representation letter gives an

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exculpatory statement and make a special request for an oral hearing under the said General Orders 1980. In such a situation this court is in a position to review and extend the general principle in the case of *Utra Badi*'s by stating the exception to this general rule. In arriving at a finding that there is a room for the exception, I find support in the following cases which categories are never closed.

[19] In *Chai Kok Choi v Ketua Polis Negara & 2 Ors* [2008] 1 MLJ 725; [2008] 1 AMR 93 (FC). the Federal Court, inter alia, stated that an oral hearing might have been necessary if the appellant had not admitted committing the offences. In that case the appellant had admitted committing the two offences in reply to the show cause letter and for that reason the court found an oral hearing would no longer be necessary. However in the present case, the appellant did not admit committing the offences as in the five charges framed against him and felt that he had exculpated himself in his representation.

[20] In *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 (CA), at p 316, the Court of Appeal explained the circumstances as to when there is a right to an oral hearing and by way of reference to the case of *R v Immmigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602 (QBD) had this to say:

> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed.

[21] In *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1 (FC), the Federal Court in my view would appear to have impliedly suggested that if there is a request, an oral hearing may have to be considered. In *Senthivelu*'s case one of the four questions posed for the determination of the Federal Court was this:

> Whether the disciplinary authority acting under the General Orders 1980 ought to have granted the respondent an opportunity to be heard orally notwithstanding that he did not ask for an oral hearing.

The Federal Court's answer to the above question was in the negative. It must be noted that, in *Senthivelu*'s case, there was no request for an oral hearing. I am of the view that the Federal Court in *Senthivelu*'s case may have decided

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otherwise if there was a request by Senthivelu for an oral hearing. The decision in *Senthivelu*'s case therefore may be restricted to situation or facts where there is no request for an oral hearing.

[22] Useful reference may also be made to the Court of Appeal cases of *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131 (CA)and *Mat Ghaffar bin Baba v Ketua Polis Neqara & Anor* [2008] 2 MLJ 1; [2008] 2 AMR 41 (CA), wherein the facts of the case and the charges framed against the public officers in *Ang Seng Wan* and *Mat Ghaffar* are similar in nature as in the present appellant's case and where action on all these officers were taken against them at around the same time.

[23] In *Ang Seng Wan*'s case, the Court of Appeal in interpreting the provision of Order 26 of the General Orders 1980 and on the right to be given to a public officer for an oral hearing, inter alia, had this to say:

> … In applying Order 26(4) of the Public Officers (Conduct & Discipline)(Chapter 'D') General Orders 1980 to the facts and circumstances of this case, the appellant had, by the letter, given sufficient exculpatory statement to rebut all the four charges. On the other hand, there was no evidence whatsoever by the defence to substantiate the four charges. Further, there was no evidence whatsoever to rebut or contradict the appellant's exculpatory statement …
>
> … The trial judge had misdirected himself when he held that, having regard to the appellant's complete denial of the charges, the commission did not err in its discretion not to proceed further by way of an oral hearing … Since there was no evidence whatsoever to contradict the appellant's exculpatory statement, it would be justifiable to hold an oral hearing or enquiry. As such, the omission to hold an oral hearing was tantamount to a failure on the part of the first respondent to afford the appellant a reasonable opportunity of being heard. Further, the documents were not supplied to the appellant. That being the case, it became all the more necessary for the oral hearing to be held … Therefore, the proceeding which resulted in the dismissal of the appellant, was not conducted in accordance with natural justice as enshrined under art 135(2) of the Federal Constitution …

[24] Similarly in *Mat Ghaffar*'s case, the principle applied in the of *Ang Seng Wan* relating to the disciplinary proceedings taken against a public officer was adopted. The Court of Appeal 'inter alia' held that it was incumbent upon the disciplinary authority to initially consider the charges made against the public officer and to determine whether in the light of representation made by him an oral hearing was warranted. On the facts the Court of Appeal found the disciplinary authority failed to do so and thus there had been a clear breach of natural justice as embodied in art 135(2) of the Constitution which rendered the disciplinary proceedings null and void.

[25] It is my considered view that the cases of *Ang Seng Wan* and *Mat Ghaffar*

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have laid down the principle and the clear situation as to when the disciplinary committee should convene an oral hearing. The position would be that when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of Order 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Federal Constitution which states that a reasonable opportunity of being heard be given before any member of such a service could be dismissed or reduced in rank. It would become all the more necessary for the oral hearing or enquiry to be held if there is no evidence to contradict the public officer's exculpatory statement. On this point it is to be stated that oral hearing should be granted when there is a request and when the disciplinary committee is faced with two (2) sets of facts, documents and evidence, that is, the investigation report from the investigating authority and that of the officer's representation letter which is exculpatory in nature. A disciplinary committee can only come to a fair conclusion between these two (2) versions upon hearing further evidence.

[26] The case of *Utra Badi* has been revisited by the Federal Court in the case of *Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor*. The Federal Court at paras (32) and (33) of the judgment made the following observations:

> 32. Of course we are conscious of the contention that an officer facing disciplinary action should not be compelled to make his plea in mitigation within his representation as that would be prejudicial to him since at that stage he is yet to be found 'guilty' of the charge preferred against him.
>
> 33. However, as explained in *Utra Badi*'s case and in the earlier cases, the relevant provisions in the Public Officers (Conduct and Discipline) (Chapter V) of the General Orders 1980 provide clear procedures and steps to be taken against an officer facing a disciplinary action. For instance, under Order 26, a prima facie case must be found first in a complaint against an officer before a charge is served on him. And in the charge itself the officer is made aware of the possible punishments if he fails to make his representation or if it does not exculpate him. In fact under Order 26(4) punishment is only imposed in an obvious and clear case of 'guilt' as per charge. Otherwise the disciplinary board has to consider the subsequent provisions therein which we think deal with cases where there is real dispute or denial by an officer of the allegation against him. Where no representation is made or there is admission to the disciplinary offence or that the representation does not exculpate the officer, Order 26(4) should apply …

Thus, the Federal Court in *Gnanasekaran*'s case observed that under Order 26(4) of the General Orders 1980 punishment is only immediately imposed without further hearing in an obvious and clear case of 'guilt' in relation to the charges framed against a public officer. However, when there is real dispute or

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denial by an officer of the allegation against him the disciplinary authority has to consider the subsequent provisions therein, that is, Order 26(5) of the General Orders 1980.

[27] I am of the view this court should distinguish the case of *Utra Badi* which states that the right to be heard given by art 135(2) of the Federal Constitution does not require the public officer concerned be given an oral hearing and recognized the fact that there are exceptions to this general rule. If such exceptions are not recognised by the courts, then the principle in *Utra Badi*'s case in my view when applied to a given case might lead to the disciplinary authority exercising its discretion arbitrarily by simply refusing to call for an enquiry for further clarification thereby taking a short cut to get its officer removed although the officer concerned may have furnished sufficient evidence to exculpate himself. On this point it is to be noted that in the present case the disciplinary authority infact did not at all reply to the appellant's request for an oral hearing as to whether his request should be considered or rejected and whether in his representation letter he was unable to exculpate himself. Some form of check and balance must be placed in such bodies which are entrusted with discretionary powers. In this context, I find support in the speech of Lord Denning MR in the case of *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA) which was referred in the case of *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 (FC) at p 356 as follows:

> … when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By 'mistakenly', I mean under the influence of a misdirection in fact or in law …

[28] In further support for the view that there should be exceptions to the general rule where oral hearing should be given, I would like to refer to a passage of the book entitled *Disciplinary Proceedings Against Public Officers in Malaysia* written by *Dr Gan Ching Chuan* (Associate Professor at Faculty of Law, UM), published by Lexis Nexis at p 105 as follows:

> … In service matters, it may not be too much to put forward as a proposition that at least in cases of dismissal or reduction in rank, an oral hearing has to be given to the affected officer for otherwise the fair hearing safeguard in art 135(2) would lose its significance and purpose as a constitutional right. The nature of the accusation and the consequences that it may entail in such cases is an added factor in support of the proposition. Another matter that need to be stressed is that if a statute is silent on the matter of oral hearing, it does not necessarily mean that oral hearing is automatically excluded because of an important rule of natural justice mentioned earlier that it may be implied if the statute is silent thereon. It needs to be pointed out also that the right to fair hearing arises as a matter of natural justice which has been constitutionalised by art 135(2) as mandatory procedural right. By virtue of

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A this constitutional guarantee, it should be interpreted liberally and broadly. It is also important to bear in mind that art 135(2) expressly states that a reasonable opportunity of being heard has to be accorded in cases of dismissal or reduction in rank but is silent on case meriting punishment lesser than dismissal or reduction in rank. By virtue of this distinction, it could therefore be argued that art 135(2) B requires an oral hearing in cases of dismissal or reduction in rank for otherwise the distinction so made would be an exercise in futility …

[29] I would further add to the above quoted passage by stating here that if C the principle laid down in *Utra Badi*'s case is to apply to all cases without exceptions then it would appear that no oral hearing may be claimed in disciplinary proceedings by a public officer facing a case of dismissal or reduction in rank. This in my view cannot be the state of position of the law bearing in mind the significance, purpose and implications of art 135(2) as a D constitutional right. Furthermore Order 26 of the General Orders 1980 itself has provided the procedure for oral hearing to be given to the public officer. Of course, there is also the rule with regard to the right to be heard which may be mentioned here as well, that is an adjudicator cannot receive evidence against a public officer behind his back without affording him a reasonable E opportunity to comment, correct and contradict the same sSee the case of *B Surinder Singh Kanda v the Government of the Federation of Malaya* [1962] MLJ 169 (FC)).

[30] Coming back to the present case of the appellant, it is my finding that F the charges framed against the appellant appear to be general in nature and lacking in particulars. As regards the charge of corruption, it is not stated where the alleged offence was committed and as to the manner in which the alleged corruption took place. Questions may be raised as to how the money was paid, was in cash or cheque and whether there is any documentary or other evidence G to support such allegations. As to the alleged relation between the appellant and the named persons involved in the offence of illegal gambling activities, the question is whether the allegation was supported by any credible evidence. If there was such evidence why it could not be furnished to the appellant to enable him to rebut the same. It is to be noted that the allegations of this nature H can easily be made and not easy to rebut.

[31] In his lengthy letter of representation containing 40 pages of explanation, the appellant denied all the five charges levelled against him by giving the reasons thereto as much as he could possibly do at that stage. He had I specifically stated in his letter of reply that if his explanation is insufficient to exculpate himself from those charges he prayed that an oral hearing by way of inquiry under Order 26 of the General Orders 1980 be given to him. In line with the case authorities cited earlier, it would be more appropriate for the disciplinary authority to initially consider the charges made against the

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appellant and to determine whether in the light of the representation made by the appellant an oral hearing was warranted. This in my view the disciplinary authority failed to do. In the present case the learned trial judge also did not at all embark to consider the facts and the circumstances of the case, although in his judgment he did indicate that the circumstances of the case do not warrant an oral hearing. After considering the serious charges levelled against the appellant, I am of the view in all fairness the appellant ought to have been given an oral hearing as requested by him to enable him to make an effective and meaningful defence to the charges. The appellant's reputation and livelihood are very much at stake in this case. On the facts and in the circumstances of this case it is my judgment that there had been a clear breach of art 135(2) of the Federal Constitution and Order 26 of the General Orders 1980 in the disciplinary proceedings taken against the appellant which renders the disciplinary proceedings null and void.

CONCLUSION

[32] For the reasons abovestated the appeal is allowed with costs here and the courts below and I make the following orders:

(a) The order of dismissal of the appellant is set aside and that the appellant be reinstated in the Royal Malaysian Police Force; and

(b) The Registrar of the High Court Malaya at Malacca will conduct an enquiry to determine the salaries, emoluments and other benefits due to the appellant.

I also make the usual order that the deposit paid into court be refunded to the appellant.

Mohd Ghazali FCJ (dissenting):

[33] I have read the draft judgment of my learned brother, Zulkefli Ahmad Makinudin FCJ in relation to this appeal and I totally disagree with it for the following reasons.

[34] On 24 March 2009, this court granted the appellant ('the plaintiff') leave to appeal on the following question of law:

> Whether the principle in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l Perumal* [2001] 2 MLJ 417 (FC) and the case of*Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1 (FC) which state, 'the right to be heard given by art 135(2) of the Federal Constitution does not require the person concerned to be given an oral hearing' applies in all cases or whether there are exceptions (to this general rule).

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A THE BACKGROUND

[35] The appellant was formerly a police officer holding the rank of Assistant Superintendent of Police. The first and second respondents are the Police Service Commission and the Government of Malaysia, respectively.

B

[36] Vide letter dated 30 June 1993, the first respondent informed the appellant of its intention to dismiss the latter from the police force in relation to five disciplinary charges under general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 (hereafter referred to as 'GO (Chapter D)' and consequently directed him to show cause why he should not be dismissed ('the show-cause letter'). The essence of the five disciplinary charges are as follows:

C

(a) found to be dishonest, to wit, receiving monthly bribes of RM1,000 between January to September 1990 from one Chong Lee Lin @ Lin Chai, an illegal 4-digit operator through one Ee Ten which is a disciplinary offence under general order 4(2)(f) of GO (Chapter D);

D

(b) found to be irresponsible, to wit, failing to take police action against Chong Lee Lin @ Lin Chai, Khu Tee Sing @ Ah Seng, Lue Chan Kong @ Siau Lee, Chong Cham and Wee Loke Choon @ Ah Choon, five illegal 4-digit operators between January to September 1990 which is a disciplinary offence under general order 4(2)(g) of GO (Chapter D);

E

(c) found to be irresponsible, to wit, failing to report to your superior officer in connection with the illegal 4-digit activities carried out by five operators, namely, Chong Lee Lin @ Lin Chai, Khu Tee Sing @ Ah Seng, Lue Chan Kong @ Siau Lee, Chong Cham and Wee Loke Choon @ Ah Choon between January to September 1990 which is a disciplinary offence under general order 4(2)(g) of GO (Chapter D);

F

G

(d) found to have conducted yourself in a manner likely to cause reasonable suspicion in that you allowed your private interests to come into conflict with your public duty, to wit, having established a close relationship with an illegal 4-digit operator, one Chong Lee Lin @ Chin Chai between March to September 1990 so as to impair your usefulness as an investigating officer which is a disciplinary offence under general order 4(2)(c)(i) of GO (Chapter D); and

H

(e) found to have conducted yourself in a manner likely to cause reasonable suspicion in that you allowed your private interests to come into conflict with your public duty, to wit, having established a close relationship with an illegal 4-digit operator, one Khu Tee Sing @ Ah Seng between May to September 1990 so as to impair your usefulness as an investigating officer which is a disciplinary offence under general order 4(2)(c)(i) of GO (Chapter D).

I

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[37] The appellant was given the opportunity to make written representation to the first respondent through the Inspector-General of Police not later than 21 days from the date of receipt of the show-cause letter. Consequently he forwarded to the first respondent his representation amounting to 40 pages vide letter dated 29 July 1993 relying on the materials he had in his possession ('the representation'). The representation was considered by the first respondent and its finding was that the representation has not shown sufficient cause. Vide letter dated 15 August 1994 the first respondent informed the appellant of his dismissal from the police force ('the dismissal letter').

[38] By writ of summons dated 6 March 1997, that is, about 2½ years after receiving the dismissal letter, the appellant sought a declaration that his dismissal from the police force is unlawful, unconstitutional, void and of no effect and that he is still an Assistant Superintendent of Police and entitled to all the salaries, emoluments and benefits due and also for damages, costs and interest.

THE TRIAL IN THE HIGH COURT

[39] At the outset of the hearing in the High Court, the parties agreed that the only issue for determination is whether the appellant's dismissal from the police force was fair and valid, having regard to:

(a) the rules of natural justice;

(b) GO (Chapter D); and

(c) art 135(2) of the Federal Constitution.

[40] The appellant contended, inter alia, that the five disciplinary charges were vague and imprecise and that it was almost impossible for anyone to answer the charges meaningfully.

[41] In response, the respondents pointed out that the five disciplinary charges were clear and that the appellant understood the same as illustrated in the representation. Further, he also forwarded his plea in mitigation without the need to request for any documents and in fact never applied for any.

[42] The High Court dismissed the appellant's claim for the reliefs sought. In a detailed and well-written judgment (since reported in the Malayan Law Journal — see *Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2005] 1 MLJ 320 (HC)), the learned trial judge, Low Hop Bing J (as he then was) noted that the appellant did not see the need to request for any particulars from the first respondent and was able to reply to the charges. The learned trial

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judge was of the view that the five disciplinary charges preferred against the appellant which contained the particulars of all the allegations were clear, precise and comprehensive and that they do serve the purpose of informing the appellant of the various allegations against him in order to enable him to reply thereto. He pointed out that had the the charges been vague and imprecise as claimed by the appellant, it would have been impossible for him to make the representation to the first respondent. He noted that the appellant had even expressed his gratitude to the first respondent for affording him the opportunity to reply to all the five charges on the basis of all the materials he had in his possession; the actual words used by the appellant in the representation read as follows:

> Walaubagaimanapun saya berterima kasih kepada Suruhanjaya Pasukan Polis kerana memberi peluang untuk menjawab tuduhan yang dinyatakan didalam kelima-lima alasan tindakan dengan bahan-bahan yang ada pada saya.

[43] In his judgment, the learned trial judge distinguished the cases referred to by counsel for the appellant, namely, *B Surinder Singh Kanda v The Government of the Federation of Malaysia* [1962] MLJ 169 (FC), *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Polis & Ors* [1995] 1 MLJ 308; [1995] 1 AMR 855 (CA) and *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131; [2002] 1 CLJ 493 (CA), in support of his argument that in the instant appeal the rules of natural justice were patently contravened in the dismissal of the appellant resulting in the infringement of his rights under art 135(2) of the Federal Constitution as the information and documentary evidence in the first respondent's possession were never given to the appellant. In addition, it was also alleged by the appellant that the first respondent's failure to hold an oral inquiry showed lack of procedural fairness in the decision making process. In relation to this, the learned trial judge said (at p 330):

> As has been noted above, the facts and circumstances in *B Surinder Singh Kanda, Raja Abdul Malek*, and *Ang Seng Wan*, are entirely different from the facts and circumstances in the instant case. I am unable to conclude that those three authorities are supportive of the case for the plaintiff herein.
>
> As a matter of law, the opportunity of being heard has been entrenched in art 135(2) and GO (D) 26.
>
> Article 135(2) is set out below:
>
> No member of such a service shall be dismissed without being given a reasonable opportunity of being heard.
>
> In particular, GO 26(4) provides as follows:

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If an officer does not furnish any representation within the specified time or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

The facts and circumstances in the instant case clearly show that the plaintiff has been served with the show-cause letter together with detailed particulars of the charges against him and that he was given the opportunity of making his representation, which he did. On the finding of facts as unfolded in the narrative above I entertain no doubt that the plaintiff has been given a reasonable opportunity of being heard, in accordance with the requirement enshrined in art 135(2) and GO 26(4).

Further, the plaintiff has clearly understood all the charges against him and has made no attempt or taken any other steps such as applying for further and better particulars or documents. I am unable to uphold the contention advanced for the defendant.

[44] The learned trial judge then referred to the judgment of this court in *Utra Badi*, where leave to appeal was granted on two questions, namely:

(a) whether a show-cause letter which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with art 135(2) of the Federal Constitution; and

(b) whether art 135(2) of the Federal Constitution require the relevant authority to accord the public officer an oral hearing.

[45] The learned trial judge said (at p 332):

Abdul Malek Ahmad FCJ (now PCA) in delivering the judgment of the Federal Court referred to *Ghazi*, and *Ganasan*, and held that the show-cause letter dated 31 January 1991 conveyed with sufficient clarity and certainty the contemplated punishment of which the respondent had been informed at the earliest available moment should he not be able to exculpate himself of the charge. He had been accorded every opportunity to defend himself as the respondent did by a letter dated 7 February 1991. However, he made no representation as regard the punishment though he has been made aware of.

His Lordship added that there is no separate right to make representations upon the punishment that ought to be meted out to the officer. The words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' in GO 26(4) does not mean that there should be another separate hearing, as the first appellant was not required to make a finding of guilt. Therefore, no injustice has been occasioned to the respondent by the failure to hear his mitigation separately.

The Federal Court also held that the right to be heard given by art 135(2) does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the appellant an oral hearing was a denial of justice.

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> Applying the principles enunciated in *Utra Badi*, supra, to the facts and circumstances of the instant case, I am of the view that the defendants have occasioned no procedural unfairness in the entire decision making process which leads to the dismissal of the plaintiff from the Police Force.

[46] On the issue for determination before the learned trial judge, viz, whether the appellant's dismissal from the police force was fair and valid, having regard to the rules of natural justice, GO (Chapter D) and art 135(2) of the Federal Constitution, he said that the answer is in the affirmative. Thus, he dismissed the action with costs. The appellant appealed to the Court of Appeal.

THE COURT OF APPEAL

[47] The appeal was dismissed. In delivering the judgment of the court (since reported in the All Malaysia Reports — see *Yusuf bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2008] 4 AMR 835 (CA)), Suriyadi Halim Omar JCA (as he then was) said (at p 845):

> To wind it up, it must clearly be stated that we were not involved in the evaluation of evidence adduced before the police commission, but to satisfy ourselves whether procedural fairness had been administered. Based on the above reasons, we were indeed satisfied that the dynamics of procedural fairness had been administered, and hence had unanimously dismissed the appeal with costs.

THE APPEAL BEFORE THIS COURT

[48] The question posed in this appeal, reproduced earlier, can be dissected in the following manner:

(a) that in *Utra Badi* and *Vickneswary* the Federal Court held that 'the right to be heard given by art 135(2) of the Federal Constitution does not require the person concerned to be given an oral hearing';

(b) whether the principle in *Utra Badi* and *Vickneswary* is applicable in all cases or whether there are exceptions to this principle.

According to the *Oxford Concise Dictionary* (9th Ed), the word 'principle' means, inter alia, 'a fundamental truth or law as the basis of reasoning or action'. What is the principle in *Utra Badi* and *Vickneswary*?

UTRA BADI

[49] In *Utra Badi*, the issues before this court were also in relation to general order 26(4) of GO (Chapter D) and art 135(2) of the Federal Constitution as in the instant appeal. The facts in *Ultra Badi* showed that the respondent, a public servant was issued with a show-cause letter to institute disciplinary

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proceedings for dismissal or reduction in rank on the ground that his urine sample was positive of morphine in breach of para (2)(d) of GO (Chapter D). In his representation to the disciplinary board ('the first appellant'), he denied that he was a drug addict. Subsequently, he was informed that he was dismissed under para (i) of general order 36 of GO (Chapter D). His appeal to the disciplinary appeal board was also dismissed. He then instituted proceedings for wrongful dismissal. The High Court decided in his favour. The disciplinary board's appeal to the Court of Appeal was dismissed. The Court of Appeal held that the respondent had been deprived of his right to make representation on punishment and secondly, that there was failure of procedural fairness as the respondent was deprived of an oral hearing.

[50] Leave to appeal was granted to the disciplinary board by this court on the following questions:

(a) whether a show cause letter issued by a public service disciplinary authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard; and

(b) does art 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing.

[51] At the end of the day, this court answered the first question in the affirmative and the second question in the negative. In delivering the judgment of this court, Abdul Malek Ahmad FCJ (as he then was) said (at p 427):

> The point taken in the Court of Appeal was whether there had been procedural unfairness when the respondent was not given the opportunity to mitigate before the first appellant decided to dismiss him especially when more than one punishment had been held out as a possible punishment for the charge that he had been found guilty of.

On this issue, the learned judge held (at p 432) as follows:

> In essence, the undoubted overall effect of the show cause letter illustrated that the respondent had at the earliest available moment been informed of the two possible punishments under consideration should he not be able to exculpate himself of the charge made. With all these in mind, he had been accorded every opportunity to defend himself.

[52] In the course of the judgment, the learned judge dealt with general order 26(4) of GO (Chapter D) as follows (at pp 439–440):

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We next look at para (4) of general order 26 of the General Orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:

'(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.'

Would the words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

This very general order was the subject of argument in *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513 (HC). Eusoff Chin J (as he then was) in the High Court held that general order 26(4) of the General Orders does not require the Public Service Commission to make a finding of guilt before dismissing the plaintiff. The Public Service Commission was only required to decide whether the plaintiffs explanation had exculpated her to the satisfaction of the Public Services Commission.

At the appeal before the Supreme Court, Mohamed Dzaiddin SCJ (as he then was) in delivering the judgment of the court in *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61 (SC), said at p 69 as follows:

The procedure adopted by the chairman of the disciplinary board and the PSC, in our view, followed strictly O 24 and 26 of the GO 'D'. The appellant was given every opportunity to exculpate herself. It is clear from the evidence that the chairman of the disciplinary board, upon receipt of the report from the State Legal Adviser, Perak, of the appellant's refusal to comply with the said service circular, decided under O 24 of GO 'D' that proceedings for dismissal should be taken against her. The chairman then referred the matter to the PSC for further action. The PSC accordingly wrote to the appellant a show cause letter which included a charge as to why she should not be dismissed from public service. The appellant then gave a reply in the form of an exculpatory representation, giving her reasons why she would continue to wear the purdah. Order 26(4) states that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer. After due consideration, the PSC decided on 10 November 1986 to dismiss her from service. The letter of dismissal was sent to her on 16 December 1986. In the result, the appellant's first ground must fail.'

About four months earlier, the same court in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (SC), had ruled that the respondent had complied with the provisions of general order 23 and general order 26 of the General Orders. Following the procedure set out in general order 26, the respondent had correctly sent the appellant a show cause letter following closely to the provisions of paras (1), (2) and (4). The show cause letter set out the grounds on which it was proposed to dismiss the appellant and invited him to furnish the respondent with a written statement which was accordingly furnished

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in great detail. Only when the respondent was satisfied that the written representation did not exculpate the appellant did he decide to dismiss him. Under para (4) of general order 26, only if the respondent considers that the case against the appellant requires further clarification, is he obliged to appoint a committee of inquiry. In such an event, both parties may be legally represented. Under the circumstances, the procedure adopted by the respondent did not in any way involve prejudice to the appellant.

Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading Senior Federal Counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para (4) of General order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

[53] In relation to the second question, viz, whether art 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing, Abdul Malek Ahmad FCJ referred to several authorities including *Zainal bin Hashim v Government of Malaysia* [1979] 2 MLJ 27 (PC), where Viscount Dilhorne in delivering the judgment of the Board said (at p 278):

It was also argued that it was contrary to art 135(2) and to natural justice that the appellant was given no opportunity of making oral representations to the Chief Police Officer and to the Inspector General though he was given the opportunity of making written representations to both of them and did so. A similar contention was advanced in *Najar Singh v The Government of Malaysia* [1976] 1 MLJ 203 (FC),) and rejected by the Board. For the reasons given in that case, this contention is again rejected.

[54] Premised on the authorities referred to, Abdul Malek Ahmad FCJ held that the right to be heard given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the respondent an oral hearing was a denial of justice and thus ruled that the second question posed is answered in the negative.

VICKNESWARY

[55] In *Vickneswary*, the facts showed that disciplinary proceedings were commenced against the respondent (now deceased), a clerk in the postal service

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on a disciplinary charge of unlawfully withdrawing monies from the accounts of 16 account holders with the Post Office, Sitiawan, Perak. He was issued with a show-cause letter dated 18 October 1984. Consequently he made his representation to the Public Services Commission ('the first appellant') by way of letter dated 23 November 1984. After considering his representation he was dismissed from service. This was done by letter dated 9 July 1985. He then instituted proceedings for wrongful dismissal.

[56] The declaration sought by the respondent was that the dismissal was unlawful and of no effect and that he was still a clerk in the postal service and entitled to all salaries and benefits attached to the position. He contended that there were material irregularities in the procedure adopted by the first appellant, namely, that the first appellant should have stated the grounds upon which it intended to take disciplinary action and not proffered the charge against him and that due to these material irregularities he was absolved from having to reply to the said show-cause letter of 18 October 1984. He also contended that there has been infringement of the provisions of art 135(2) of the Federal Constitution in that he was not afforded an opportunity to present his views on punishment before the punishment referred to hereinbefore was imposed on him and further that the punishment imposed under the circumstances violates the rules of natural justice.

[57] The respondent's action was dismissed by the High Court. He was successful in his appeal to the Court of Appeal mainly on the grounds of delay on the part of the disciplinary authority in commencing and completing the disciplinary proceedings. Subsequently, leave was granted to refer to this court four questions, including the following:

(a) whether the court could place itself in the shoes of the disciplinary authority acting under the general orders in determining whether a particular procedure is fair or not;

(b) whether it is the court and not the disciplinary authority to decide whether the officer had, in his written representation, exculpated himself from the charges preferred against him; and

(c) whether the disciplinary authority acting under the general orders ought to have granted the respondent an opportunity to be heard orally notwithstanding that he did not ask for an oral hearing.

[58] In allowing the appeal by the Public Services Commission, this court held as follows:

(a) from the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the

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respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it;

(b) it is clear from the facts that the respondent was given an opportunity to be heard whereby he had given a lengthy written representation explaining in detail his innocence;

(c) it is not the court, but the disciplinary authority who has to decide the question of whether he had exculpated himself by his written representation.

[59] In delivering the judgment of this court, Zaki Azmi PCA (as he then was) said (at p 9):

> It is quite well established that the courts in Malaysia should be wary in adopting principles of law which is based on the common law of England when there is specific provision in our statute. Jemuri Serjan J in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara & Anor* [1994] 2 MLJ 114 (SC), said this (at pp 120–130):
>
> Lest we forget in that case His Lordship was dealing with judicial review at common law and the passage above does not apply to a case regulated by statutes or subsidiary legislation which have legislative effect.
>
> Similarly, in this case, we have examined the relevant provisions of the general orders 1980 (Chapter D), and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry under the circumstances of this case was not justified. In dealing with general orders 1980 (Chapter D) we remind ourselves that we are dealing with general orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at p 110:
>
> … if the legislation has made provision for that opportunity to [to be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the Legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

[60] Thus this court has ruled, as can be seen above, that the courts should not import common law from other countries where legislation in Malaysia has clearly provided for it. In relation to the general orders, Zaki Azmi PCA said

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that is clear that it is never the intention of the legislators to give an officer under disciplinary action the right to give oral evidence; he said (at pp 10–11):

> According to general orders 24, 25 and 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, the disciplinary authority is required to first determine whether the disciplinary offence committed by any officer merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank. Should they decide that he could be punished with dismissal or reduction in rank, then the disciplinary authority is required to send to the officer a statement in writing of the ground or grounds which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing, within a period of not less than fourteen days from the date of receipt of the letter, a representation containing grounds which the officer relies to exculpate himself. Should the disciplinary authority consider that the case against the officer requires further clarification then it may appoint a committee of inquiry. This is a decision of the disciplinary authority, not the officer or the court. At this enquiry the officer will be allowed and if the committee shall so determine shall be required to appear before it and exculpate himself. Again this is the decision of the disciplinary authority. The wording of general order 26(6) is sufficiently clear that his right to appear and exculpate himself in person is at the discretion of the committee of inquiry.

[61] I noted that there are several judgments of this court prior to *Utra Badi* (decided on 24 April 2001) and *Vickneswary* (decided on 22 September 2008) relating to the same issues arising in the instant appeal. I would think that the law is settled in cases of this genre and the courts below in the instant appeal have religiously followed the authoritative precedents of this court which are binding and must be followed. The following two earlier judgments of this court would illustrate that the law is settled in cases of this genre:

(a) in *Zainal bin Hashim v Government of Malaysia* [1979] 2 MLJ 276 (PC), the Privy Council held that the right to be heard given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the appellant an oral hearing was a denial of natural justice; and

(b) in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (SC), in delivering the judgment of the Supreme Court, Jemuri Serjan CJ (Borneo) also referred to *Zainal bin Hashim*, the learned CJ (Borneo) said (at p 128):

> The Privy Council thus confirmed the decision of the Federal Court on the same issue. Incidentally, Viscount Dilhorne also delivered the judgment in *Zainal*'s case. Suffian CJ (Malaya) (as he then was) in the Federal Court case of *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138 (FC) reviewed various authorities and dealt extensively with the meaning of the words 'the right to be heard' and decided that in the circumstances of that case, an oral hearing was unnecessary as the defendants had given the plaintiff a reasonable opportunity of being heard.

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> There should not be anymore lingering doubt as to what the phrase 'right to be heard' or opportunity of being heard' mean at common law or in the statute, and it must be accepted that the issue has been settled, as well as can be on the authorities cited above. Therefore, this point is cadit quaestio;

and at pp 130–131 the learned CJ (Borneo) said:

> … In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with general orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at p 110:
>
> 'If the legislation has made provision for that opportunity to (be heard) to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

[62] I would think that in cases of this genre as the instant appeal, the court is not concerned with the question whether on the facts alleged and found by the disciplinary authority they were entitled to dismiss the appellant. The court is concerned only with procedure (see *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138 (FC)).

[63] From my reading, the question posed in the instant appeal, analysed earlier, is premised on an hypothesis and thus it is questionable whether it can fall within the contemplation of s 96 of the Courts of Judicature Act 1964. I would say that the question posed is a proposition suggested by obiter dictum available in the cases that counsel for the appellant referred to in his written submission. From my reading, the question posed denote that the appellant is not disputing the principle in *Utra Badi* and *Vickneswary* but is requesting this court to speculate on 'whether there are exceptions' to this principle.

[64] This is how counsel for the appellant canvassed his point at the outset of his written submission:

> It is submitted that the Appellant when replying his show cause letter made SPECIFIC REQUEST for an enquiry for further clarification as provided under Regulation 26 of Public Officers (Conduct and Discipline) (Chapter D) General

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Orders 1980 (hereinafter refer[r]ed to as Chapter 'D' 1980); if the 1st Respondent is not satisfied/if the Appellant is unable to exculpate himself in his representation. Please see page 234 para 17 RR.

[65] Counsel then referred to general order 26(5) of GO (Chapter D) and argued as follows:

Despite the specific request made by the Appellant, the First Respondent did not reply as to whether the request of the 1st Appellant shall be considered or rejected and if rejected why?

Instead the 1st Respondent just sent a simple letter dated 15/8/1994 informing the Appellant that he has been dismissed without even stating whether the Appellant in his representation letter was unable to exculpate himself (Please see the letter informing the decision at page 235 RR).

General order 26(5) of GO (Chapter D) reads:

(5) Where the appropriate disciplinary authority considers that the case against the officer requires further clarification, it may appoint a committee of inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's head of department shall not be selected to be a member of the committee.

[66] Counsel then went on to argue as follows:

(a) the Court of Appeal failed to differentiate the facts in *Utra Badi* and the appellant's case;

(b) that each case must be viewed on its own facts and circumstances;

(c) in *Utra Badi* 'the request was NOT for an oral hearing by way of an enquiry for further clarification, but an oral hearing for mitigation only; and it must also be noted that there was no special request made by the officer in *Utra Badi*'s case'; and

(d) in the instant appeal, the request for an oral enquiry was specifically requested by the appellant for the purpose of enabling him to provide further clarification 'if the first Respondent is not satisfied with his representation'.

[67] Premised on the above arguments, counsel submitted as follows:

Thus it is our humble submission that the principle in *Utra Badi* is a general principle and restricted to its facts. It does not cover situation where the officers in his representation letter gives an exculpatory statement and make a special request for an oral hearing under Regulation 26 Chapter 'D' 1980.

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Therefore, we humbly submit that, the Federal Court should review and extend the general principle in the case of *Utra Badi* by stating the exceptions to this general rule.

[68] Counsel then went on to argue that there is room for 'exceptions to this general rule' and that he found support in, inter alia, the following cases:

(a) *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 MLJ 725; [2008] 1 AMR 93 (FC) — counsel referred to the following excerpt from the judgment of this court at p 98 (as underlined) where Ahmad Fairuz CJ said:

> As regards the second question, we took into consideration that the appellant had admitted committing the first two charges. This is clearly shown in the letter dated 23 May 1995 in reply to the show cause letter. That being the position, what useful purpose would it serve to have an oral hearing. An oral hearing might have been necessary if the appellant had not admitted committing the offences. It tantamounts to him having pleaded guilty to those charges. As such, a hearing would no longer be necessary. The explanation which he gave would only serve to mitigate the sentence. But such explanation would not require having an oral hearing. Having it written as done by the appellant would be sufficient and would not cause any injustice to the appellant. Our answer to the second question is that on the facts and circumstances of this case, an oral hearing would not be necessary.

(b) *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 (CA) — counsel referred to the following excerpt from the judgment of the Court of Appeal at p 316 (as underlined) where Gopal Sri Ram JCA (as he then was) said:

> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. *Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed* (See *R v Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602; [1977] 1 WLR 795).

(c) *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131 (CA) — This is a judgment of the Court of Appeal delivered by Mohd Saari JCA. Counsel reproduced the headnotes of the report (at p 132) in his written submission which illustrate that it was held as follows:

> (3) In applying Order 26(4) of the Public Officers (Conduct and Discipline)

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(Cap 'D') General Orders 1980 to the facts and circumstances of this case, the appellant had, by the letter, given sufficient exculpatory statement to rebut all the four charges. On the other hand, there was no evidence whatsoever by the defence to substantiate the four charges. Further, there was no evidence whatsoever to rebut or contradict the appellant's exculpatory statement (see p 136B-C, E-F).

(4) The trial judge had misdirected himself when he held that, having regard to the appellant's complete denial of the charges, the commission did not err in its discretion not to proceed further by way of an oral hearing (see p 136F-G); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (CA) distinguished.

(5) Since there was no evidence whatsoever to contradict the appellant's exculpatory statement, it would be justifiable to hold an oral hearing or enquiry. As such, the omission to hold an oral hearing was tantamount to a failure on the part of the first respondent to afford the appellant a reasonable opportunity of being heard. Further, the documents were not supplied to the appellant. That being the case, it became all the more necessary for the oral hearing to be held (see pp 136H–137A, C).

(6) Therefore, the proceeding, which resulted in the dismissal of the appellant, was not conducted in accordance with natural justice as enshrined under an 135(2) of the Federal Constitution.

(d) *Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* — This is a judgment of this court which was then unreported (since then reported in the All Malaysia Reports — see *Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [2010] 6 MLJ 441; [2011] 2 AMR 765 (FC)). Counsel referred to the judgment of this court where Richard Malanjum CJ (Sabah & Sarawak) said (at p 770):

> Of course we are conscious of the contention that an officer facing disciplinary action should not be compelled to make his plea in mitigation within his representation as that would be prejudicial to him since at that stage he is yet to be found 'guilty' of the charge preferred against him.
>
> However, as explained in the *Utra Badi* case and in the earlier cases, the relevant provisions in the Public Officers (Conduct and Discipline) ('Chapter D') General Orders 1980 provide clear procedures and steps to be taken against an officer facing a disciplinary action. For instance, under GO 26, a prima facie case must be found first in a complaint against an officer before a charge is served on him. And in the charge itself the officer is made aware of the possible punishments if he fails to make his representation or if it does not exculpate him. In fact under GO 26(4) punishment is only imposed in an obvious case and clear case of 'guilt' as per charge. Otherwise the DB has to consider the subsequent provisions therein which we think deal with cases where there is a real dispute or denial by an officer of the allegation against him. Where no

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representation is made or there is admission to the disciplinary offence or that the representation does not exculpate the officer, GO 26(4) should apply.

VICKNESWARY

(v) Counsel argued that in *Vickneswary*, this court 'seems to impliedly agree that, if there is a request, an oral hearing should be considered'. He referred to p 11 of the judgment where Zaki Azmi PCA said:

> From the provisions of the general orders it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.

Counsel then pointed out that in *Vickneswary* there was no request for an oral hearing and consequently argued that this court would have decided otherwise if there was a request for an oral hearing. He then contended that *Vickneswary* 'may be restricted to situation or facts where there is no request for an oral hearing'.

[69] Counsel also argued that *Ang Seng Wan*, and *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 2 AMR 41 (CA) (a decision of the Court of Appeal) illustrate the clear situations when the disciplinary committee should convene an oral hearing, namely, when there is a request and when 'he has exculpated himself and denied all the charges, evidence must be adduced to contradict his exculpatory statement'.

[70] It is my view that the arguments canvassed by counsel for the appellant before this court in the instant appeal were based on a misconstrued premiss, viz, that the appellant made a specific request for an oral hearing. With respect, there is clear misappreciation of the facts on the part of counsel. According to *The Concise Oxford Dictionary* (9th Ed), the word 'specific' means 'clearly defined; definite' and according to *Webster's New World Dictionary and Thesaurus* (2nd Ed) the word 'specific' means 'definite; explicit'. As such, I dare say that the premiss on which counsel based on in canvassing his argument was due to an erroneous reading of para 17 of the representation to the first respondent which, in its original form, read as follows:

> 17. Izinkan saya memohon budi bicara Yang Berbahagia Datuk' memberi peluang kepada saya, sekiranya representasi saya ini kurang menyakinkan saya memohon diadakan satu inquiry sepertimana perbekalan di bawah Peraturan 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Di sini izinkan saya merayu sekali lagi kepada Yang Berbahagia Datuk' supaya

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A mempertimbangkan surat representasi saya ini demi masa depan saya dan keluarga saya. Saya masih bertenaga untuk mencurahkan khidmat bakti kepada Pasukan dan Negara.

B **[71]** From my reading, what the appellant stated in para 17 of the representation is that in the eventuality that the first respondent find his representation to be less than convincing ('kurang menyakinkan'), he would request that an inquiry he held as provided under order 26 GO (Chapter D), ie, that the first respondent appoint a committee of inquiry, to consider his case. That was the essence of the said para 17. To me, it was not a 'specific request' as
C canvassed by counsel for the appellant. Order 26(5) of GO (Chapter D) clearly provides that the disciplinary authority 'may appoint a committee of inquiry' if it 'considers that the case against the officer requires further clarification'. This would clearly denote that if the disciplinary authority finds that the representation does not require 'further clarification', the question of an
D appointment of committee of inquiry does not arise at all (see *Vickneswary*). What has been made an issue by counsel for the appellant was a manifest misappreciation of facts and from an error of law despite the clear provisions of GO of (Chapter D) and the judgments of this court referred to earlier.

E **[72]** On the whole, I cannot see any intrinsic tightness in the arguments canvassed by counsel for the appellant that the principle in *Utra Badi* is a general principle and restricted to its facts and does not cover a situation where an officer has requested for an oral inquiry for the purpose of enabling him to
F provide further clarification. There is no provision in general order 26 GO (Chapter D) that state that an officer can request or demand that a committee of inquiry be appointed by the disciplinary authority to consider his case. It is for the disciplinary authority to decide whether the case against the officer requires further clarification. If it considers that the case require further
G clarification, only then it may appoint a committee of inquiry. In the instant appeal, the dismissal letter clearly denote that the first respondent has determined that the representation has failed to exculpate the appellant to their satisfaction. In other words, they concluded that they require no further clarification, and consequently decided to dismiss him from the police force.

H **[73]** I have perused the cases referred to by counsel for the appellant and I find that the passages referred to in those judgments were not the ratio decidendi of those cases but were judicial observations, that is, obiter dictum.

I **[74]** According to *Osborn's Concise Law Dictionary* (8th Ed) the term ratio decidendi means:

> [The legal reason (or ground) for a judicial decision.] It is the ratio decidendi of a case which will be binding on later courts under the system of judicial precedent.

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According to the same dictionary the term obiter dictum means: A

> [A saying by the way.] An observation by a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision. It is therefore not binding as a precedent. But there is no justification for regarding as obiter dictum a reason given by a judge for his decision because he has given another reason also. B

[75] According to *Mozley & Whiteley's Law Dictionary* (12th Ed) the term ratio decidendi means: C

> the reasons or ground upon which a case is decided; a phrase often used in opposition to obiter dictum.

According to the same dictionary the term obiter dictum means:

> A dictum, ie, a statement, of a Judge on a point not directly relevant to deciding the case before him. D

[76] Simply put, the term ratio decidendi means the legal reasons of the judge in reaching a finding in a case before him and it is a fundamental part of establishing precedents that is binding on lower courts. It brings about consistency to the application of case law. Setting out the reasons for a judgment is a fundamental part of the administration of justice. The term obiter dictum in Latin means remarks or comments in passing. These remarks or comments are judicial observation and are not binding. In other words, they are remarks or comments made by judge in a decision that do not form part of the legal reasoning in reaching the decision. According to *Osborn's Concise Law Dictionary* the word 'precedent' means: E F

> A judgment or decision of a court of law cited as an authority for deciding a similar set of facts; a case which serves as authority for the legal principle embodied in its decision. The common law has developed by broadening down from precedent to precedent. G
>
> A case is only an authority for what it actually decides. The only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him (per Sir George Jessel MR *Re Hallet* (1880) 13 Ch D 712. H

[77] With the above in the forefront of my mind, my analysis of the cases cited by counsel for the appellant is as follows: I

(a) In *Chai Kok Choi*, Ahmad Fairuz CJ said 'that an oral hearing might have been necessary if the appellant had not admitted committing the offences'. I am of the view that this is clearly not the ratio decidendi of the case. It is a mere remark or comment in passing by the judge and from my

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reading was not a matter which arose that would require a decision. The facts showed that the appellant admitted committing the disciplinary offence and thus, logically there was clearly no reason for the disciplinary authority to require further clarification and appoint a committee of inquiry under general order 26(5) GO (Chapter D). If the appellant had denied committing the disciplinary offence it is for the disciplinary authority, pursuant to general order 26(4) GO (Chapter D) to determine whether his representation fails to exculpate himself to its satisfaction. The question of an oral hearing would only arise if the disciplinary authority considered that the case against the officer requires further clarification and only then would a committee of inquiry be appointed.

(b) In *Raja Abdul Malek Muzaffar Shah*, Gopal Sri Ram JCA said 'cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed' and within this context referred to an English case. Again, I would say this certainly cannot be the ratio decidendi of the case. What the learned judge said was nothing more than a mere remark or comment in passing and was made with reference to the position in English common law. That observation is, with respect, a 'damp squib' in the light of the judgment of this court in *Vickneswary*, discussed earlier, where the learned PCA said 'the courts in Malaysia should be wary in adopting principles of law which is based on the common law of England when there is specific provision in our statute'

(c) In *Ang Seng Wan*, the issue before the Court of Appeal was whether the proceedings which resulted in the dismissal of the appellant was conducted in accordance with natural justice. The appellant's case was dismissed by the High Court. In allowing the appeal, Mohd Saari JCA said (at p 136):

> In applying Order 26(4) aforesaid to the facts and circumstances of this case, we are of the view that, by his letter dated 23 July 1993, ASP Ang had given sufficient exculpatory statement to rebut all the four charges. On the other hand, with regard to the defence's case, we find no evidence whatsoever to substantiate the four charges.
>
> In judicial review cases as here, the court is concerned with whether procedural fairness had been administered and the court has no jurisdiction to consider the merits of the case (see *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363). It follows, therefore, that the court is not involved in the evaluation of evidence which transpired at the disciplinary proceeding as stated by Abdoolcader J in *Mak Sing Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at p 178:

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> Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v Minister of Health* [1938] 1 KB 655, *Jacob v Attorney General* [1970] 2 MLJ 329).

> However, what troubles this court is that, from the record, there is no evidence whatsoever to rebut or contradict the exculpatory statement of Ang.

At pp 136–137, Mohd Saari JCA continued as follows:

> There is nothing in law which prohibits a disciplinary authority from holding an oral hearing or enquiry. The decision whether to hold an enquiry or not would depend on the circumstances of each case. Under the circumstances of this case, the fact that there is no evidence whatsoever to contradict the exculpatory statement of ASP Ang, the holding of an oral hearing or enquiry would, in our view, be justifiable. It follows, therefore, by such omission, it tantamounts to failure on the part of PSC to afford ASP Ang a reasonable opportunity of being heard.

At the end of the day, the Court of Appeal held that the dismissal of the appellant 'was not conducted in accordance with natural justice as enshrined under art 135(2) of Federal Constitution' and allowed the appeal. Mohd Saari JCA said 'the holding of an oral hearing or enquiry would, in our view, be justifiable' under the circumstances of the case as 'there is no evidence whatsoever to contradict the exculpatory statement of ASP Ang'.

I am of the view that *Ang Seng Wan* could not have withstood the judgments of this court in *Utra Badi* and *Vicknesawary* which were decided later. In other words, I dare say that *Ang Seng Wan* has been overulled by *Utra Badi* and *Vickneswary*. A departmental disciplinary action is concerned not with criminal offence but with misconduct. A court's review of an administrative decision following a hearing is significantly more limited than would be the case when the court hears an appeal from the subordinate courts. The court will only intervene in cases of this genre where there was a fundamental procedural flaw. Unless that limitation or constraint is observed, the court will itself be guilty of usurping power. The court should not concern itself with the conclusion of the disciplinary proceedings and whether it was the correct decision as long as the right procedures have been followed. The court should also not substitute what it thinks is the correct decision. Further, the court cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority and not that of the court.

I would further say that in *Ang Seng Wan*, the Court of Appeal was clearly wrong in ruling that the representation by ASP Ang was an 'exculpatory statement'. It is for the disciplinary authority to determine whether the representation exculpate the officer. The court cannot usurp that power. In the instant appeal,

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counsel for the appellant has also canvassed his case on the assumption that the appellant's representation was 'an exculpatory statement', as he put it, leading to a fallacious argument which has no bearing on the question of law posed.

(d) In *Gnanasekaran*, I am of the view that the excerpt from the judgment of this court (at p 779 of the law report) which was referred to by counsel for the appellant, with respect, is superflous and is certainly not the ratio decidendi of the case. The learned CJ (Sabah & Sarawak) was merely narrating as well as reiterating the judgment of Zaki Azmi PCA (as he then was) in *Vickneswary* with regards to the provisions of GO (Chapter D). I do not think I need to go further on this.

(e) In *Vickneswary*, Zaki Azmi PCA, in relation to GO (Chapter D), said that 'it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it'. Counsel argued that in this part of the judgment this court 'seems to impliedly agree that, if there is a request, an oral hearing should be considered'. I do not agree that there is such an implication. I also cannot comprehend how counsel had the temerity to argue as such. In relation to this, I would refer to *NS Bindra's Interpretation of Statutes* (10th Ed) where the learned author said (at p 435):

> It is elementary that the primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and not (sic) outside consideration can be called in aid to find that intention. A statute must be constructed in a manner which carries out the intention of the legislature. The intention of the legislature must be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it. When the language of the law admits of no ambiguity and is very clear, it is not open to the courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.

[78] It is my conclusion in the instant appeal that the court has no reason to interfere with the decision of the first respondent and that the appeal must be dismissed as there is no real error of law. As mentioned earlier, I do not agree with the draft judgment in the instant appeal of my learned brother, Zulkefli Ahmad Makinudin FCJ. I noticed that he sought to criticise the first respondent's finding based on procedural requirements which were not spelt out in GO (Chapter D). This is wholly outside the scope of the court. His decision is also based on the premiss that the courts below in the instant appeal failed to 'differentiate the factual circumstances and the issue for determination in *Utra Badi*'s case with the appellant's case'.

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This is how he put it:

(a) in *Utra Badi* the appellant did not request for 'the right of an oral hearing by way of an enquiry for further clarification if the disciplinary authority is not satisfied with his representation, but a request to be given the right of an oral hearing for mitigation only before punishment was meted out';

(b) 'it must also be noted that there was no specific request made by the officer in *Utra Badi*'s case for an oral enquiry for further clarification if the disciplinary authority is not satisfied with his representation'.

[79] With due respect to my learned brother, I cannot see how these 'factual circumstances' can have any bearing on the decisions of the courts below in the instant appeal. In the same vein, I cannot see how one can correlate these 'factual circumstances' to the provisions of GO (Chapter D). In *Utra Badi*, the appellant complained that he was deprived of his right to make representation on punishment and that he was deprived of an oral hearing. It is not disputed that he did not make any 'specific request' for an oral inquiry with regards to punishment. At the end of the day, this court held that there is no separate right to make representations on punishment. I am of the view that even if the appellant in *Utra Badi* had made a 'specific request' for an oral inquiry with regards to punishment, it would have no bearing on the proceedings if it is turned down by the disciplinary authority. General order 26(5) of GO (Chapter D) is clear, viz, it is only when the disciplinary authority considers that the case against the officer 'requires further clarification' that it may appoint a committee of inquiry.

[80] I would reiterate my view that the arguments canvassed by counsel for the appellant in the instant appeal were based on a misconstrued premiss, viz, that the appellant made a specific request for an oral hearing. From my reading of the representation to the first respondent, as discussed earlier, no 'specific request' was made. Be that as it may, I would say that even if there was such a 'specific request' in the representation, it would be of no consequence if the first respondent does not accede to that request and subsequently determine the case and issue the dismissal letter. This situation clearly indicated that the first respondent has considered the case against the appellant and denote that they do not require any further clarification and hence, the question of appointing a committee of inquiry does not arise.

[81] For the aforesaid reasons, I would totally disagree with my learned brother on his finding that the courts below 'failed to differentiate the factual circumstances and the issue for determination in *Utra Badi*'s case with the appellant's case'. No such thing happened. There is clearly no flaw in the conclusion of facts and on the law reached by the courts below with regards to the instant appeal. In his draft grounds of judgment, it appears that my learned

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brother wholly adopted the arguments canvassed by counsel for the appellant in his written submission. I have discussed those points earlier in my judgment and I find no necessity to repeat my views with regards to the same.

[82] I must mention here that in his draft grounds of judgment, my learned brother said that it is his finding that the charges framed against the appellant 'appear to be general in nature and lacking in particulars'; he said:

> Coming back to the present case of the appellant, it is my finding that the charges framed against the appellant appear to be general in nature and lacking in particulars. As regards the charge of corruption, it is not stated as to the manner in which the alleged corruption took place. Questions may be raised as to how the money was paid, was in cash or cheque and whether there is any documentary or other evidence to support such allegations. As for the alleged relation between the appellant and the named persons involved in the offence of illegal gambling activities in the town of Seremban, the question is whether the allegation was supported by credible evidence. If there was such evidence why it could not be furnished to the appellant to enable him to rebut the same. It is to be noted that the allegations of this nature can easily be made and not easy to rebut.
>
> In his lengthy letter of representation containing 40 pages of explanation, the appellant denied all the five charges levelled against him. He had specifically stated in his letter of reply that if his explanation is insufficient to exculpate himself from those charges he prayed that an oral hearing by way of inquiry under Order 26 of the General Orders 1980 be given to him. In line with the case authorities cited earlier, it was incumbent upon the disciplinary authority to initially consider the charges made against the appellant and to determine whether in the light of the representation made by the appellant an oral hearing was warranted. This in my view the disciplinary authority failed to do. In the present case the learned trial judge also did not at all embark to consider the facts and the circumstances of the case, although in his judgment he did indicate that the circumstances of the case do not warrant an oral hearing. After considering the charges levelled against the appellant, I am of the view in all fairness the appellant ought to have been given an oral hearing as requested by him to enable him to make an effective and meaningful defence to the charges. In the circumstances I agree with the submission of learned counsel for the appellant that there had been a clear breach of art 135(2) of the Federal Constitution and Order 26 of the General Orders 1980 which renders the disciplinary proceedings null and void.

[83] I cannot agree with what has been reproduced above. The institution of disciplinary proceedings against the appellant was premised upon the code of conduct laid down in general order 4 of GO (Chapter D). Disciplinary action is clearly a process for dealing with job related behaviour that does not meet the code of conduct of officers in the public service. A departmental disciplinary action is concerned not with criminal offence but with misconduct. Departmental authorities have no power to punish an employee on a criminal charge, although such authorities may penalise an employee for his misconduct

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on identical facts. The right to punish a citizen for crime is vested in the state whereas the right to penalise an employee for misconduct is in the employer because of the existence of relationship of master and servant and also because the rules so provide in certain cases (see *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513 (HC); *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61 (SC)).

[84] It is apparent in the instant appeal that the appellant is asking the court to review an administrative decision. The authorities revolving around this genre of cases suggest that there is a significant limitation on what the court can do than would be the case when a superior court considers an appeal from a trial court's ruling. The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in the disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw.

[85] The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the first respondent, which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has there been an error in the process or whether there was procedural irregularity in the decision making proceedings leading the appellant's dismissal.

[86] The first respondent, viz, the Police Service Commission is a disciplinary authority. It should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in a court of law. In the instant appeal, I am of the view that the first respondent did observe the rules of natural justice and did give the appellant an opportunity to be heard. An opportunity to be heard means an opportunity to present one's side of the story. The result cannot be faulted or characterised as bad or defective when the proceedings were properly and regularly conducted. The appellant was informed of the charges against him and was given ample opportunity of denying or explaining the alleged misconduct. The decision of the first respondent cannot be said to be perverse. The court is not entitled to consider whether the decision itself, on the merits of the facts, was fair and reasonable. It must be stressed that the courts cannot introduce technicalities of a court of law to the disciplinary authority. The courts do not regard it as their function to interfere with the findings of fact by the disciplinary authority. In *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, Diplock LJ said (at p 488):

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> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

[87] In cases of this genre, the court reviews the lawfulness of a decision or action made by a public body. Such action is tantamount to a challenge to the way in which the decision has been made by the public body rather than the rights and wrongs of the conclusion reached. The court is not really concerned with the conclusions of that process and whether the conclusions were 'right', as long as the right procedures have been followed. In *Ng Hock Seng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 (FC), in delivering the judgment of the Federal Court, Peh Swee Chin FCJ said (at p 159):

> Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

[88] Thus, a court should not substitute what its thinks is the "correct" decision. In relation to this, I would think that the following persuasive view of Lord Brightman in Chief Constable of the *North Wales Police Force v Evans* [1982] 1 WLR 1155 would assist us in comprehending the function of the court in cases of this genre, he said (at p 1173):

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

[89] The question posed in the instant appeal is whether the principle in *Utra Badi* and Vickneswary which state, 'the right to be heard given by art 135(2) of the Federal Constitution does not require the person concerned to be given an oral hearing' applies in all cases or whether there are exceptions to this general rule. My answer would be that the principle applies in all cases. An oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a committee of inquiry pursuant to general order 26(5) of GO

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(Chapter D). If the disciplinary authority considers that no further clarification is required, I do not think that the officer concerned can insist or demand that a committee of inquiry be appointed.

[90] I would reiterate that from my reading, the question posed in the instant appeal is premised on an hypothesis and that it is questionable whether it can fall within the contemplation of s 96 of the Courts of Judicature Act 1964. At the time of preparing this judgment, I was made aware of the recent judgment of this court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 (FC), where Zaki Azmi CJ said (at p 49):

> So in my view, once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel. Also, to use the word of Abdul Hamid Mohamad JCA in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, 'It is res judicata'. The appellate panel should respect the leave panel and just proceed to hear the appeal, even if the appeal is groundless. More often than not no reasons are given at leave stage.

[91] This court has heard the instant appeal and thus the question of not respecting the leave panel concerned does not arise. Be that as it may, I would say that the question denote that the appellant is not disputing the principle in *Utra Badi* and *Vickneswary* but is requesting this court to speculate on 'whether there are exceptions (to this general rule)'. An applicant for leave under s 96 of the Courts of Judicature Act 1964 is under obligation to formulate a substantial question of law and then only this court is permitted to proceed with the case to decide that question. I would think that the legislative intention in s 96 of the Act is clear, namely, that the legislature never wanted the second appeal to become a third trial on facts. Thus, it is my view that this court would be justified in admitting the second appeal only when a substantial question of law is involved and that the question must precisely state such a question. The appeal should only be heard on that question. A wide right of the second appeal is more in the nature of a luxury. The real justification for an appeal on a substantial question of law is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court as that there should be a final rule laid down which binds all future cases and so facilitates the prognostication of the law.

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[92] It is my conclusion that this appeal must be dismissed with costs. The orders of both the courts below are affirmed. I would order that the deposit be remitted to the respondents towards costs.

Appeal allowed with costs.

Reported by Kohila Nesan